Supreme Court, U.S.
FILED
APR 3 1997
CLERK

No. 96-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN and KHAN & ASSOCIATES,
an Illinois Corporation,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

JOHN BAUMGARTNER
Counsel of Record
CHURCHILL, BAUMGARTNER
& QUINN
P.O. Box 284
Grayslake, Illinois 60030
(847) 223-1500

PAUL KALINICH
KALINICH AND McCLUSKEY
800 Roosevelt Road
Bldg. A, Ste. 106
Glen Ellyn, Illinois 60137
(630) 469-8930

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that an agreement between a supplier and a dealer, under which the dealer's margin or markup was limited was a *per se* violation of the Sherman Act?

2. Did the court below err in holding that a gasoline dealer, who was limited to a margin of 3.25 cents per gallon, was entitled to recover damages under §4 of the Clayton Act, for losses which he claimed from his inability to increase his profit by increasing his price to consumers?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to this cause.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 93 F.3d 1358. The underlying judgment of the trial court is reported at 907 F.Supp. 1202. The opinions of the District Court and the Court of Appeals are also reproduced in the Appendix to the Petition for Certiorari. The decision of the Court of Appeals appears at Pet. App. 1a, and the decision of the trial court at Pet. App. 24a.

JURISDICTION

The court of appeals entered judgment on August 29, 1996. Pet. App. 1a. This Court granted a petition for certiorari on February 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Jurisdiction in the trial court was under §4(a) of the Clayton Act (15 U.S.C. §15[a]).

STATUTORY PROVISIONS

§1 of the Sherman Act (15 U.S.C. §1)

Contracts, Combinations and Conspiracies in Restraint of Trade

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several State, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be

punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§4(a) of the Clayton Act (15 U.S.C. §15[a])

Actions for Damages

(a) Damages; Prejudgment Interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court

order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

STATEMENT OF THE CASE

Defendant State Oil Company was the owner of a parcel of real estate improved with a gasoline station/convenience store. It was also a distributor of gasoline for major oil companies. State Oil Company entered into an agreement with the plaintiff Khan (JA 13) under which it leased the gasoline station/convenience store to him, and also agreed to sell him gasoline for resale to the public. (JA 15) That agreement provided that State Oil Company was to set a suggested retail price for each grade of gasoline, and would sell the gasoline to Khan for 3.25 cents per gallon under that suggested price. (JA 26-27) The agreement did not require Khan to sell at the suggested price. However, if he raised his price above the suggested price, he was obligated to pay all excess to State Oil.

After Khan had operated the station for a year, a receiver was appointed by a state court. That receiver operated the station for five months. Khan claimed that the receiver had charged a margin in excess of 3.25 cents per gallon during his term of operation, and that he, therefore, lost profits because he was influenced by the contract provision not to raise his price. (JA 33-42)

The District Court for the Northern District of Illinois granted summary judgment in favor of State Oil (Pet. App. 24a), holding that there was no showing by plaintiff that the provision complained of contained any anticompetitive aspect, that the damages claimed by plaintiff were not antitrust damages, and that there was no evidence that plaintiff actually suffered any injury, and that the rule of reason should be employed in any analysis. The Court of Appeals for the Seventh Circuit reversed, remanding the case to the District Court. (Pet. App. 1a)

SUMMARY OF ARGUMENT

The antitrust laws are designed to promote free competition. For this reason, certain types of activity, which have a pernicious effect on competition and lack any redeeming virtue are conclusively presumed to be unreasonable, and therefore illegal. Horizontal price fixing by competitors has been deemed illegal, *per se*. Since 1911, vertical minimum resale price maintenance has also been regarded as illegal, *per se*. In 1968, the decision in *Albrecht v. Herald Company*, 390 U.S. 145, 88 S.Ct. 869 (1968), extended the *per se* prohibition to maximum resale price maintenance.

The vertical establishment of a maximum price will rarely have an adverse effect on competition. Although there may be a degree of harm to a dealer whose pricing is limited, that harm results from the potential for a reduction in the margin between the retail price and the wholesale price. There is always a wholesale price and a maximum possible retail price. A manufacturer or wholesaler who wishes to achieve the effects described in

Albrecht can do so by merely increasing the wholesale price. In either case, however, the harm is to the dealer and not to competition.

There are potential procompetitive effects from the vertical establishment of a maximum price. Initially, retailers may be prevented from abusing a local monopoly position or even participating in a dealer cartel. In addition, manufacturers and wholesalers, who also have an interest in the market, will be able to utilize price as a means of interbrand competition, by ensuring that price reductions will not simply inure to the benefit of dealers. Wholesaler participation in the pricing process will increase competition.

The decision establishing vertical maximum price fixing as a *per se* violation is outside of the main line of antitrust authority, and the principles of *stare decisis* should not prevent reconsideration of the question involved.

One of the elements of a cause of action on the part of a private party under the antitrust laws is the existence of an antitrust injury, an injury resulting from the anticompetitive effects of defendant's actions. The establishment of maximum prices does not produce an anticompetitive effect. The plaintiff in this case has made no claim of any injury except for a loss of the ability to earn more money by charging higher prices. This is not the type of injury the antitrust laws were intended to prevent.

ARGUMENT

INTRODUCTION

In *Northern P. R. Co. v. United States*, 356 U.S. 1, 2 L.Ed.2d 545, 78 S.Ct. 514 (1958), this Court described the function of the Sherman Act and the basis for *per se* liability under that Act in the following terms:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." 356 U.S. 1, at 4, 2 L.Ed.2d 545, at 549, 78 S.Ct. 514.
>
> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. 356 U.S. 1, at 5, 2 L.Ed.2d 545, at 549, 78 S.Ct. 514.

A determination was made in *Albrecht v. Herald Company*, 390 U.S. 145, 88 S.Ct. 869 (1968), that vertical maximum price restraints have a pernicious effect on competition and lack any redeeming virtue, even though the defendant in that case was actually attempting to prevent the plaintiff from using a monopoly position to raise prices to consumers.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986), and *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 110 S.Ct. 1884, at 1892 (1990), this Court held that a private party suing under §4 of the Clayton Act must establish, in addition to a violation of the antitrust laws, that it suffered an antitrust injury, an injury resulting from an anti-competitive aspect of the conduct which constituted a violation of the antitrust laws. A distinction was made, however, between a competitor and a dealer, with a reservation of the possibility that vertical maximum price limitations might cause antitrust injury to a dealer, even though it could not cause such injury to a competitor.

I.

VERTICAL MAXIMUM PRICE RESTRAINTS SHOULD BE JUDGED BY THE RULE OF REASON

A. Vertical Maximum Price Restraints are Not Anti-competitive: There are five concerns about maximum price restraints which are expressed in *Albrecht* (390 U.S. 152-153). These are (1) interference with dealer freedom; (2) the possibility that the supplier will set price too low, thereby squeezing the dealer; (3) possible restrictions on dealer services desired by customers; (4) channeling distribution to a few dealers; and (5) possibility that maximum price may be a disguised minimum price. The dealer in this case was claiming interference with his pricing freedom, and that the wholesaler incorrectly set the prices of the gasoline to be sold at the station.

The retailer was carrying three grades of gasoline. He claimed that if he had reduced the price of regular gaso-

line and increased the price of the two higher grades, he could both have sold more gasoline and earned more money. The increase in the price of the higher grades, plus the increased sales volume of regular, would have more than covered the reduction in the price of regular.

This is a claim that the wholesaler did not correctly establish the price relationship between the grades of gasoline, and that one party or the other could have made more money had the prices been established differently. This claim has nothing to do with competition. The effect on the public would have been identical if it had been the wholesaler which had reduced the wholesale price of regular to the dealer and increased the wholesale price of premium to the dealer. The wholesaler would then have earned the additional profit, but the consumer's position would have been identical. This is not a claim that the actions of the wholesaler reduced competition, it is a dispute about the profitability of various pricing strategies.

The primary concern of the antitrust laws is interbrand competition. *Business Electronics v. Sharp Electronics*, 485 U.S. 717, at 726, 99 L.Ed.2d 808, 108 S.Ct. 1515, at 1521 (1988). In most circumstances, vertical maximum price restraints would enhance interbrand competition. Retailers who for some reason were not being forced by market conditions to reduce prices to meet competition, would be forced by the restriction to reduce those prices.

Market conditions might permit higher prices because the retailer holds a local monopoly position, as in *Albrecht*, or because of a horizontal pricing agreement among local retailers. Higher prices may result from a belief on the part of the retailer, as in this case, that he

could make more money with a higher profit margin, despite a lower volume of sales.

The remaining possibilities expressed in *Albrecht* relate to the profit margin which will remain to the retailer after the maximum price is established. They are not based on the maximum price by itself, but on the relationship between the price which the retailer can charge and the price which the retailer must pay to the wholesaler. If the margin between the wholesale price and the maximum possible retail price is too small, then the retailer will be squeezed, and will be unable to provide services. He may even be forced out of business. This is true whether that maximum price is established by the market or by the wholesaler. If the wholesaler increases the price to the retailer to the point at which the market prevents the retailer from earning an adequate profit, these same effects will occur. However, a wholesaler which drives out its own retailers is injuring itself, not competition.

There is no incentive to establish a maximum price, or, as in this case, a maximum margin, unless that price is lower than the maximum price dictated by market conditions. The objective must necessarily be with sales volume. A manufacturer or wholesaler who sets both the maximum price and the wholesale price is also necessarily establishing the retailer's maximum possible profit margin.[1] If that margin is agreed upon in advance, then the primary question is merely whether the retailer made a good deal or a bad deal. If the wholesaler retains

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[1] Or, as in this case, a wholesaler who sets the wholesale price and the maximum margin is necessarily establishing the retailer's maximum price.

discretion in pricing, it will be in a position to reduce the retailer's profit margin. However, a party who retains the right to set a price is required by §2-305(2) of the Uniform Commercial Code to exercise that discretion in good faith. State Oil is not suggesting that the retailer should be deprived of a remedy, merely that antitrust is not the appropriate remedy.

There is a difference between an activity which can be used in a deliberate attempt to reduce interbrand competition, and one which cannot be so used. When a wholesaler fixes a minimum price, the retailer is deprived of the right to utilize price reduction as a means of competition. Competing retailers are then relieved of the need to meet that price competition. This is an effective means of supporting a dealer cartel, or even a cartel among wholesalers. In contrast, a maximum price limitation cannot be used to reduce interbrand competition. It may deprive an individual retailer of the ability to utilize some particular marketing technique, such as enhanced services. However, this does not represent an attempt to reduce competition, it represents a difference of opinion between the retailer and the wholesaler or manufacturer concerning the most effective means of marketing the particular product. The wholesaler and manufacturer are also entitled to opinions concerning the best means of marketing the product.

A price reduction should enhance price competition. A reduction could drive competitors out of the market. However, unless the reduction is predatory and the cost of new competitors entering the market is prohibitive, the effect on consumers will be positive. It will not be possible to produce a situation in which the wholesaler or manufacturer will ultimately be able to raise prices above the normal competitive level.

There was no evidence or claim in this case that the consumer was injured. There was no evidence or claim of predatory pricing. There was no evidence or claim that anyone other than plaintiff and defendant were affected. There was no evidence or claim that this arrangement could ever be used to affect anything other than the pricing relationship between the individual wholesaler and retailer.

B. Vertical Maximum Price Restraints Can be used to Promote Competition: Nothing in the antitrust laws, or in economic theory, establishes that any one level of the economic chain is more competitive or more capable of fostering competition than any other level. Market forces operate at each level. Competition is not limited to the retail level. Manufacturers and wholesalers also engage in price competition, although they may conduct that competition through retailers. A wholesaler attempting to attract public interest to a new product, or attempting to increase volume in order to introduce handling efficiency, must be able to insure that its price reductions to the retailer are passed on to the public.

There is no evidence that retailers are more capable of appropriately pricing items. If vertical maximum price restraints are forbidden, the manufacturer and wholesaler are denied the right, in many cases, to participate with their retailers in the use of pricing as a competitive tool, and the consumer is ultimately denied the benefit of that element in the competitive chain. Consumers are not served by a rule denying manufacturers and wholesalers the right to ensure that their products are priced

in a manner which will enhance volume of sales rather than retailer profit. The ultimate effect of *Albrecht*, is that all pricing decisions must be left to the retailer. However, the basic premise in *Albrecht* that retailers will better serve consumers when they are given freedom from any pricing constraints is incorrect. If freedom from restraints on competition is the purpose of the Sherman Act, then *Albrecht* is an aberration. That decision frees the retailer by placing restraints on the freedom of the wholesaler and manufacturer. Because of the *per se* rule, that restraint on the wholesaler and manufacturer is absolute. The defendant is not permitted to justify its actions or to show that establishing a maximum margin is pro-competitive. There is no claim in this case that the wholesaler could have had any adverse effect on competition. The claim is that State Oil restrained plaintiff's ability to earn more money. Yet, if *Albrecht*, is applied, State Oil is guilty of restraining trade.

Competitive price is not something which is exact. The minimum price is determined primarily by the cost of the item. Sales at cost will maximize volume, but will result in no profit. With each price increment, profit margin will rise and sales will drop. At some point, there is the figure at which profit margin multiplied by volume of sales will produce the maximum profit. If price is increased above that level, the drop in volume will more than eliminate the advantage of the increased margin. When the relationship between the wholesaler and the retailer comes into consideration, that price is the one at which the combined profit of the two entities is maximized. That profit must then be divided between the entities. The division will depend on the relative bargaining power of the parties.

If the base cost for the item is $8.00, and $10.00 is the price at which the combined margin and volume produces the maximum profit,[2] the actual price of the item will depend upon the degree to which sales drop off when the price is raised above that level. The incentive for each party is to increase the price to the level which will maximize its own profit.

For example, if the wholesaler sells to the retailer at $9.00, accepting a margin of $1.00 per unit, and leaving a $1.00 margin for the wholesaler, and the retailer believes that sales will drop from 100 to 60 if the price is increased to $11.00, the retailer will make more money by selling 60 units at a $2.00 profit than it will make selling 100 units at a $1.00 profit. The overall profit drops from $200.00 to $180.00, the wholesaler's profit drops from $100.00 to $60.00, but the retailer's profit increases from $100.00 to $120.00. At this point, the incentive to the wholesaler is to increase the wholesale price to $10.00. The wholesaler then earns $120.00 and the retailer earns $60.00. Either way, the consumer receives fewer items at an increased price.

It may be assumed that in a free economy, each party will act in its own best interest. This is the only assumption which can be made in considering antitrust questions. If each party decides that volume is in its best interest in the long run, there is no problem and the item will continue to sell for $10.00. If, however, either party decides to maximize profit at the expense of volume, the consumer will pay more for a reduced supply. As this

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[2] This example is taken, in part, from 8 Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 1635-38 (1989).

Court noted in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 L.Ed.2d 568, 97 S.Ct. 2549 (1977), note 24 at 433 U.S. 56, a manufacturer or wholesaler would generally "prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher revenues."

The responses which are presently available to the wholesaler are limited. In theory, it may be entitled to refuse to deal with retailers who charge more than a suggested price. It may be able to require the retailer to maintain a certain sales volume. It can reduce the price to the retailer, and hope that the retailer will pass this reduction on to the consumer. It can raise the wholesale price and obtain the increased profit itself.

A refusal to deal is normally not practical, and is quite possibly not available. In this particular case, the wholesaler has leased its gasoline station to the retailer. It cannot afford to refuse to sell to that retailer. It cannot reserve the right to terminate the lease unless the retailer complies with pricing mandates, without being guilty of illegal price restraints. In many situations which fall within the various acts regulating franchises, a refusal to deal is a violation of the applicable franchise act. In this case, a termination of Khan's lease would violate the Petroleum Marketing Practices Act. 15 U.S.C. 2801, *et seq.*[3]

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[3] The Petroleum Marketing Practices Act is designed to protect dealers from arbitrary terminations, and forbids termination of franchises except in specific situations. Under that statute, a franchisor might be able to terminate a dealer for failure to follow a contractually established pricing arrange-
(continued...)

It might be possible to require the retailer to meet a minimum volume requirement, thereby forcing a more competitive price. Such an agreement would be difficult to enforce except by means of termination. Termination is a remedy which is often not cost effective, and requires the wholesaler to find another outlet. In addition, a minimum sales requirement would produce serious risks to the retailer.

The wholesaler can also provide price incentives, but is unable to insure that those incentives are passed on to the consumer and are not retained by the retailer.

There are decisions such as *Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401 (2nd Cir., 1994), which indicate that the wholesaler could refuse to provide price supports or reductions to those retailers who did not pass the reduction on to the consumer.[4] An attempt by a manufacturer or wholesaler to increase sales by means of a price reduction is both competitively and economically desirable. Yet, in each of these cases, the defendant had entered into a convoluted arrangement to ensure that retailers did not merely pocket the price support which was being provided. These arrangements are necessary to avoid a claim of vertical maximum price restraints. When merchants are entering into convoluted

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[3] (...continued)
ment, if antitrust law permitted contract provisions relating to pricing. Such an arrangement would presently be forbidden by antitrust law.

[4] See also *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir., 1983); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons*, 705 F.2d 1203 (10th Cir., 1982); *Butera v. Sun Oil Company, Inc.*, 496 F.2d 434 (1st Cir., 1974).

arrangements in order to carry on an economically desirable activity, there is something wrong with the legal rule which mandates that arrangement.

In addition, each of those decisions is directed towards a specific promotion or particular discount. However, using the example set forth above, a wholesaler who elects to sell to the retailer for $9.00, when it could sell for $10.00, is also providing a price reduction. It would make little sense to create an exception to *Albrecht* for situations in which a special promotion was provided, yet deny that exception for the situation in which the general price was reduced in an attempt to enhance sales volume. It also would make little sense to permit convoluted schemes to achieve this purpose, yet to deny the right to carry out the purpose directly.[5]

Naturally, the majority of retailers will cooperate in promoting the combined maximum of sales and profit for both parties. However, the schemes considered in the decisions set forth above are an indication that there are significant exceptions. These exceptions normally arise when some dealers pass on the reduction, while others do not. The incentive to the wholesaler is either to engage in some circuitous arrangement to help insure a retail price reduction, or in the alternative to raise the wholesale price to a level at which the wholesaler achieves the maximum profit. Neither solution is in the best interest of consumers, retailers in general, or competition.

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[5] The indication is that if the wholesaler in this case had merely sold to the dealer at 3.25 cents per gallon under the pump price selected by the dealer, establishing a floor under which it would not go, this arrangement would have met the test set forth in *Butera*, supra.

Vertical maximum price restraints should not be considered *per se* illegal. This type of restraint by a manufacturer or wholesaler should be considered under the "rule of reason".

C. Concern for Prior Decisions Should Not Mandate *Per Se* Treatment in This Case: Certain principles about antitrust and *per se* liability were clearly enunciated In *Northern P. R. Co. v. United States*. Particular agreements or practices are presumed to be unreasonable because of their "pernicious effect on competition and lack of any redeeming virtue." 356 U.S. 1, at 5, 2 L.Ed.2d 545, at 549, 78 S.Ct. 514. Neither the practice condemned in *Albrecht*, nor the practice under consideration in this case, meet that standard. *Per se* liability for vertical maximum price restraints actually inhibits competition, because it reduces the ability of the manufacturer and wholesaler to utilize price as a means of competition.

As this Court has explained, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 52 L.Ed.2d 707, 97 S.Ct. 2061 (1977); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 354, 73 L.Ed.2d 48, 102 S.Ct. 2466 (1982), it is reluctant to overrule prior decisions in situations involving statutory construction. An exception exists, however, "when the intervening development of the law has 'removed or weakened the conceptual underpinning from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies'" *Neal v. United States*, 116 S.Ct. 763, 769 (1996), quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Albrecht is grounded in *United States v. Arnold, Schwinn & Co.* 388 U.S. 365, 18 L.Ed.2d 1249, 87 S.Ct. 1856 (1967), and the *per se* prohibition of vertical restraints and assumption that exclusive territorial agreements are undesirable and anticompetitive which are presented in that decision. Both *Albrecht* and *Schwinn* flow from the concept that a restraint on alienation or on the freedom of the individual retailer is an unreasonable restraint of trade. *Schwinn* was overruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), and the concepts presented in that decision are not in conformity with present day approaches to antitrust law. In *Schwinn*, as in *Albrecht*, *per se* liability had been extended into an area where the rule could not be justified under the standards established in *Northern Pac. R. Co.* The decision in *Albrecht* has, if anything, received even more criticism from antitrust scholars than the decision in *Schwinn*.[6] There has been no showing that vertical maximum price restraints could have an adverse effect on competition. A number of procompetitive effects of vertical maximum price restraints have been identified.[7]

There would be no negative aspects to overruling *Albrecht*. No business has developed to make use of the principles advanced in that decision, nor have any

[6] See, for example, Easterbrook, *Maximum Price Fixing*, 48 U.Chi.L.Rev. 886 (1981). Blair and Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539 (1989), 8 Phillip E. Areeda, Antitrust Law: *An Analysis of Antitrust Principles and Their Application* ¶¶ 1635-38 (1989), Blair, *The Ghost of Albrecht*, 40 The Antitrust Bulletin 205 (1995).

[7] See note 13, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884 at 1894 (1990).

business strategies developed in an attempt to make a positive use of that ruling. The developments, such as vertical integration, sales quotas, and price announcements, have been directed towards avoiding the problems presented by *Albrecht*. The principles of *stare decisis* should not prevent the reconsideration and overruling of *Albrecht*.

II.

PLAINTIFF DID NOT SUFFER AN ANTITRUST INJURY

In addition to the fact that the defendant is guilty of a violation of the antitrust laws, an antitrust plaintiff must also establish that it suffered an antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). In *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986), and *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 110 S.Ct. 1884, at 1892 (1990), this Court has made it very clear that maximum price restraints cannot generate antitrust injury.[8]

> Antitrust injury does not arise for purposes of §4 of the Clayton Act, see n. 1, *supra*, until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct, see *Brunswick*, 429 U.S., at 487, 97 S.Ct., at 696. In the context of pricing practices, only predatory pricing has the requisite effect. See Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88

[8] There would be an exception for effective predatory pricing, a situation which was described in *Matsushita*, supra, as extremely unlikely and difficult to achieve.

Harv. L. Rev. 697, 697-699 (1975); McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 292-294 (1980). Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury. *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 110 S.Ct. 1884, at 1892 (1990).

It is true that this decision was rendered in an action brought by a competitor rather than by an affected retailer. In *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 110 S.Ct. 1884, at 1895, this Court distinguished between injury to competitors and injuries to the retailers whose pricing is limited, reserving the possible anticompetitive consequences detailed in *Albrecht*, supra.

The court of appeals, in discussing the question of antitrust injury (Pet. App. 10a-11a) stated that it could not say that it was not the position of this Court that interference with the ability of a dealer to raise prices might constitute antitrust injury. In *Caribe BMW v. Bayerische Motoren Werke*, 19 F.3d 745, at 753 (1st Cir., 1994), the First Circuit read *Albrecht* as identifying three possible injuries which might constitute antitrust injury. First, the "maximum" resale price agreement might be, in reality, a disguised "minimum" resale price agreement. Second, a maximum resale price agreement might prevent a dealer from providing services and conveniences that customers would want to the point that the customers would accept the price increases needed to provide them. Third, a maximum resale price agreement might channel distribution through a few large or specifically advantaged dealers, the only ones able to earn a profit at the mandated low resale price.

The dealer in this case made no contention that any of these features existed. The allegation in the complaint was that State Oil interfered with his freedom to set his own prices. The evidence presented in response to the summary judgment motion was that he was merely unable to earn more money by charging a higher price for certain grades of gasoline. To forestall a motion for summary judgment, a non-movant plaintiff must present sufficient evidence to show the existence of each element of his case on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This leaves merely the possibility that this Court is of the opinion that a loss of profit to the dealer is, in itself, an antitrust injury. In no decision, however, has this Court identified mere loss of profits from increased prices as a source of antitrust injury. That designation is a misreading of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*

There is actually little difference between the types of injury which could be incurred by competitors and the types of injury which could be incurred by dealers subject to the restraint. Each has a potential to lose profits due to an inability to raise prices. If the wholesale price paid by the rival dealer is higher, then that dealer will probably be injured. If the wholesale price paid by the rival dealer is identical, then each will merely be forced to become more competitive. This is the nature of competition. The motivation to bring suit will, however, be somewhat different. If the dealer is injured by the maximum price established, it is because market conditions were such that the dealer could have charged more to the public and the loss of sales resulting from that increase would be less than the increased margin. That is

the claim in this case. If the dealer could not have charged more to the public, then it has not been injured by the maximum price limitation. The competitor, on the other hand, is more likely to be objecting to a loss of business to the dealer who reduced prices. In essence, the dealer is more likely to file suit in consequence of an unsuccessful price reduction attempt. The competitor is more likely to file suit in consequence of a successful attempt.

Although maximum price restraints could cause an injury to a retailer, just as they could cause an injury to a competitor, they cannot cause injury to competition. The possible injuries related in *Albrecht* are identical to the injuries which could be caused to a competitor. The price established could be too low for the retailer, whether it is a competitor or restricted dealer, either to survive or to properly perform its function. There is nothing in the antitrust laws or in any decision of this Court which indicates that the dealer who is directly affected by a restriction is entitled to more protection than are competitors. This Court declined to dilute the antitrust injury requirement for the benefit of a competitor. *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 110 S.Ct. 1884, at 1895 (1990). It should also decline to dilute that requirement for the benefit of a retailer.

CONCLUSION

Neither the actions of the Defendant in this case, nor the general aspects of the vertical establishment of maximum permitted prices, is anticompetitive. The establishment of maximum permitted prices is an attempt on the

part of the Defendant, and generally on the part of wholesalers and manufacturers to increase sales volume.

Defendant does not dispute the concept that market forces should determine what goods and services are offered, at what price those goods and services are sold, and whether particular sellers succeed or fail. Defendant is merely arguing that it should not be denied the right to enter into a contract with a retailer, which would permit the supplier to respond to those market forces. The freedom from restraints for which the retailer is arguing in this case is actually a restraint on the ability of the wholesaler to utilize price as a means of competition.

The claimed injury suffered by the Plaintiff in this case is not the result of any anticompetitive effect from Defendant's actions. There is no claim or contention that Defendant affected competition in any adverse manner. Plaintiff has not suffered an antitrust injury.

The district court correctly entered summary judgment in favor of the defendant, and that judgment should be reinstated and affirmed.

Respectfully submitted,

JOHN BAUMGARTNER
Counsel of Record
CHURCHILL, BAUMGARTNER & QUINN
P.O. Box 284
Grayslake, Illinois 60030

PAUL KALINICH
KALINICH AND McCLUSKEY
800 Roosevelt Road
Glen Ellyn, Illinois 60137

Attorneys for Petitioner